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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-419

BRAHANEY DRILLING COMPANY and LEATHERWOOD DRILLING COMPANY, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. A, 1a-7a) covering both the *Leatherwood* and *Brahaney* cases (which were consolidated for decision) is reported at 513 F. 2d 270. The decision and order of the National Labor Relations Board in *Leatherwood* (Pet. App. B, 10a-33a) are reported at 209 NLRB 618, and the Board's decision and order in *Brahaney*

(Pet. App. C, 33a-57a) are reported at 209 NLRB 624.

JURISDICTION

The judgment of the court of appeals enforcing the Board's orders (Pet. App. A, 7a-9a) was entered on June 18, 1975. The petition for a writ of certiorari was filed on September 16, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether, in the circumstances of these cases, the Board properly concluded that the employers lacked a reasonable basis for believing that the union certified as representative of their employees no longer enjoyed majority support and thus that the employers violated the National Labor Relations Act by withdrawing recognition from the union.

STATUTE INVOLVED

In addition to the provisions set forth at Pet. 3, the other relevant provision of the National Labor Relations Act, as amended (61 Stat 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) is:

> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

A. The Board's Findings of Fact

Leatherwood Drilling Company and Brahaney Drilling Company are two of 50 to 60 oil well drilling contractors who operate in the Permian Basin of Texas and New Mexico (Pet. App. A, 2a). In 1968 and 1969, the Board certified Local 826, International Union of Operating Engineers, AFL-CIO ("the Union"), as the bargaining representative for the employers' drilling employees [1] pursuant to its special election formula for the Permian Basin drilling industry [2] (Pet. App. A, 2a-3a).

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[1] The Brahaney certification was issued in 1968, and the Leatherwood certification in 1969 (Pet. App. A, 14a, 38a).

[2] Permian Basin drilling contractors characteristically undertake jobs of relatively short duration. After the completion of a job the contractor either immediately moves his drilling rig to a new site or takes it out of service until a new job is available. In either situation, when the rig is again placed in operation it may be stationed many miles from its former location; in that case, a sizeable component of its new crew will be hired out of the general area of the new site. Thus, frequent relocation of operations and high turnover of employees is a feature of this industry. See *Hondo Drilling Co.*, 164 NLRB 416, 417, enforced, *National Labor Relations Board* v. *Hondo Drilling Co.*, 428 F. 2d 943 (C.A. 5). In order to protect the voting rights of the employees of the Permian Basin drilling contractors, the Board, in *Hondo Drilling*, fashioned a formula of voter eligibility which took the industry's special pattern of employment into account (164 NLRB at 417) (see Pet. App. A, 2a, n. 1). Pursuant to this *Hondo* formula, the Board conducted a series of elections and thereafter certified the Union as the collective bargaining representative for the employees of 13 industry contractors, including petitioners.

Following the Union's election victories and its certification, Leatherwood refused to recognize the Union until November 1970 (Pet. App. B, 15a). Brahaney refused to do so until ordered by the Fifth Circuit on March 9, 1971.[3] Due to the drilling companies' refusal to engage in multi-employer bargaining, which required the Union to use its limited manpower in individual negotiations over a wide geographic area, and the companies' normal operating lulls, the subsequent bargaining negotiations between the Union and Brahaney and Leatherwood were characterized by delays (Pet. App. A, 4a; Pet. App. B, 15a-16a, 21a-25a; Pet. App. C, 39a-40a).

Thus, in January 1971, Leatherwood announced that its rigs were out of service for an indefinite period, and the parties agreed to postpone negotiations (Pet. App. B, 19a, n. 11). The Union submitted its initial contract proposal to Leatherwood in May 1971, and the parties' first bargaining session was scheduled for June 1971 (LGCX 13, 18).[4] However, although the Union met with Company Attorney Harman[5] with respect to other drilling contractors dur-

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[3] *National Labor Relations Board* v. *Brahaney Drilling Co.* and *National Labor Relations Board* v. *Tri-Service Drilling Co.*, 432 F. 2d 1271, certiorari denied, 401 U.S. 940, judgment entered March 9, 1971.

[4] "R." references are to the original record in the *Brahaney* case, which includes the transcript before the Board and the volume of pleadings. "L.R." references are to the record in the *Leatherwood* case. "LGCX" and "LRX", respectively, refer to the General Counsel's and the Respondent's exhibits in that case.

[5] Harman was the bargaining negotiator for 10 of the 13 unionized drilling companies (Pet. App. B, 22a).

ing this period, the Union, with Leatherwood's acquiescence, cancelled the meeting scheduled for June and did not request another meeting until December, some five months later. The difficulties in coordinating the schedules of Attorney Harman and the Union's representatives with respect to the eight separate negotiations which they were then carrying on (LGCX 22-27) prevented the parties from sitting down for their first bargaining session until March 1972. By June 1972, Leatherwood and the Union had come to an agreement on some items, but were still divided over such issues as wages, a grievance-arbitration procedure, and various fringe benefits (Pet. App. 15a-16a; L.R. 242-252, 256-266).

Contract talks between the Union and Brahaney followed a similar pattern. In May 1971, the Union submitted its proposals for a contract (Pet. App. B, 39a), and in June the parties held their first bargaining session (Pet. App. B, 39a). As with Leatherwood, and for the same reasons, a five-month hiatus occurred before the Union requested another meeting, which was scheduled for December. Again, due to scheduling difficulties, the parties did not actually sit down for their second bargaining session until January 1972 (Pet. App. C, 39a). At this meeting, Brahaney submitted its counterproposals to the proposals submitted by the Union eight months earlier (R. 200-202). Thereafter, the parties had further bargaining sessions in March, April, July, and October of 1972 (Pet. App. B, 39a). At the conclusion of the

October 13 session, the parties had come to agreement on some items, but were still divided over such issues as compulsory arbitration and various fringe benefits (Pet. App. C, 39a; R. 146-156).

Following its June 1972 meeting with Leatherwood and its October 1972 meeting with Brahaney,[6] the Union did not communicate with Attorney Harman regarding either Company until April 19, 1973 (Pet. App. B, 16a, 40a). However, between June 1972 and April 1973, Harman was actively engaged in contract negotiations with the Union's two negotiators on behalf of other drilling contractors (Pet. App. A, 5a, 10a, n.1; Pet. App. B, 23a). (See L.R. 466, n.1, 438; 236-238, 253-254, 266-275, 280-281, 290-291, 299-304, 316, 335-336, 362-363; LRX 16). On several occasions, one of the Union negotiators told Harman about his heavy workload and the scheduling problems it created (Pet. App. B, 24a, n. 15).[7]

On April 19, 1973, the Union asked Harman to resume negotiations for Leatherwood and Brahaney, just as the Union had done after the earlier bargaining hiatus in 1971 (Pet. App. B, 19a, n. 11; Pet. App. C, 42a-44a). By letters dated May 9, 1973

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[6] The Union had suspended negotiations with Brahaney after the Company informed it that all its rigs were down (Pet. App. C, 43a-44a).

[7] Throughout the Leatherwood negotiations, Harman "assumed that [the Union was] anxious to negotiate the contract, and when they could do it, they would do something about it" (L.R. 227), and he never complained about the Union's not requesting more frequent bargaining sessions during that period (L.R. 276-277).

(from Leatherwood) and June 4, 1973 (from Brahaney), Harman stated that the Companies refused to bargain further because they each had a "good faith doubt" of the Union's majority status (Pet. App. B, 16a; Pet. App. C, 40a).[8]

B. The Decisions Below

The Board held that Leatherwood and Brahaney violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from and refusing to bargain with the Union (Pet. App. B, 28a-29a; Pet. App. C, 51a-52a). In so holding, the Board, adopting the decisions of the Administrative Law Judge, rejected the Companies' assertions that the hiatuses in bargaining (lasting 10 months at Leatherwood and 6 months at Brahaney), coupled with high employee turnover at both Companies, justified their doubts of the Union's continuing majority (Pet. App. B, 21a-29a; Pet. App. C, 40a-51a).

The Board pointed out that neither employer had produced any evidence of employee defections or dissatisfaction with the Union (Pet. App. B, 26a; Pet. App. C, 46a-47a). Regarding the hiatuses, the Board noted that the Companies knew that they were characteristic of the industry due to the geographic dispersal of employers and Union manpower problems, which were exacerbated by the requirement that the Union bargain with each employer individually (Pet.

[8] About June 4, 1973, Brahaney also unilaterally granted its employees a general wage increase without notifying or consulting the Union (Pet. App. C, 40a).

App. B, 22a-24a; Pet. App. C, 41a-43a). The Board found that, during the hiatuses, the Companies' negotiator was actively negotiating with the Union on behalf of other drilling companies and there was no "sensible explanation as to why [the Companies] would assume that the Union would single out [them] for abandonment, contemporaneous with its efforts to secure bargaining agreements with [their] competitors" (Pet. App. B, 24a; Pet. App. C, 44a-45a).* Finally, the Board concluded that, while the Permian Basin drilling industry was characterized by a high rate of turnover, "this fails to persuade that the presumption that replacements will support a union to the same extent as their predecessors is a fallacy in this industry. If it is fair to assume that replacements will support a union where the level of turnover is 50%, this assumption is no less valid where the turnover amounts to 900%. The fact that 9 employees might in a given time period fill a single job previously held by a union supporter, does not warrant an assumption that the ninth replacement will support the union to any lesser degree than the first" (Pet. App. B, 26a-27a; Pet. App. C, 48a-49a).

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* The Board also observed (Pet. App. C, 43a-44a) that Brahaney, having in October 1972 led the Union to believe that all its rigs would soon be out of operation (see n. 6, *supra*), could not have overlooked—in assessing the reasons for the hiatus—the fact that "the lack of communication from the Union during [the hiatus] was consistent with [its] previously manifested disinterest in negotiating while an employer's rigs were down."

The Board ordered the Companies, *inter alia*, to bargain with the Union upon request (Pet. App. B, 31a-32a; Pet. App. C, 55a-56a). The court of appeals upheld the Board's decisions and enforced its orders (Pet. App. A, 1a-7a). The court held that substantial evidence supported the Board's findings that the Companies had not "overcome the presumption of continuity of majority status and, therefore, have no room for good faith doubt of the viability of the Union's continued representation of the bargaining unit" (*id.* at 7a).

ARGUMENT

Board certification of a union as the bargaining representative of unit employees creates a rebuttable presumption of continuing majority status after the expiration of the certification year. *Brooks* v. *National Labor Relations Board*, 348 U.S. 96, 98. Brahaney and Leatherwood were privileged to withdraw recognition from the Union after the certification year only if they had a reasonable basis for a good faith doubt of the Union's continuing majority status. *National Labor Relations Board* v. *Gulfmont Hotel Co.*, 362 F. 2d 588, 589 (C.A. 5). These well settled propositions are not in question here. The sole issue raised by the petition is whether substantial evidence supports the Board's findings that petitioners did not have such a good faith doubt. That issue, which rests on the particular factual circumstances here, does not warrant further review.

Petitioners' contention that the Board "was arbitrary and abused its discretion" by failing to "look at the totality of all the circumstances" (Pet. 8, 10) is belied by the Board's careful, detailed assessment of the record (*supra*, pp. 7-8). Nor is there merit to petitioners' assertion (Pet. 17-20) that the decision herein conflicts with decisions in other cases, for those cases are factually distinguishable.[10]

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[10] The total absence of any evidence of employee dissatisfaction with the union distinguishes the instant case from *Taft Broadcasting, WDAF-TV*, 201 NLRB 801, *Southern Wipers, Inc.*, 192 NLRB 816, and *Viking Lithographers, Inc.*, 184 NLRB 139 (Pet. 13-15). In *Ingress-Plastene, Inc.* v. *National Labor Relations Board*, 430 F. 2d 542, 546-547 (C.A. 7) (Pet. 17), in addition to significant employee turnover and four documented instances of dereliction of duty on the union's part, the union admitted to the employer that in a unit of 156 employees the 49 checkoff authorizations represented the upper limit of its employee support. In *National Labor Relations Board* v. *Laystrom Mfg. Co.*, 359 F. 2d 799, 800-801 (C.A. 7) (Pet. 18), the court relied, *inter alia*, on the fact that, while the union had been willing to prove its continued majority status after the first two yearly contracts, it refused to do so after the latest agreement following a very close election. In *Philip Carey Mfg. Co., Miami Cabinet Div.* v. *National Labor Relations Board*, 331 F. 2d 720, 734-735 (C.A. 6) (Pet. 18), the union originally won the election by a 122 to 112 margin but as a result of a strike that 122 employees joined, all but 15 of the 122 strikers were permanently replaced. *National Cash Register Co.* v. *National Labor Relations Board*, 466 F. 2d 945 (C.A. 6), cited by petitioners (Pet. 18), does not deal with the "good faith" doubt issue; petitioners apparently rely on a case of the same name reported at 494 F. 2d 189 (C.A. 8). In the latter case, however, in addition to turnover, employee decertification petitions were filed with enough signatures to require an election under Board

Finally, the Board and the court below properly rejected petitioners' argument (Pet. 11-13) that the usual principle concerning the impact of employee turnover [11] should not be applied to the Permian Basin drilling industry. A high degree of turnover is inherent in that industry, and, as the Board noted (*supra*, p. 8), "[i]f it is fair to assume [in the absence of evidence to the contrary] that replacements will support a union where the level of turnover is 50%, this assumption is no less valid where the turnover amounts to 900%."

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procedures, which "fact alone," the court concluded, would justify an employer's refusal to bargain (494 F. 2d at 194). There was also evidence of employee resignations from the union as well as evidence of a decline in the number of employees authorizing dues checkoff.

[11] It is well settled that turnover does not itself afford a reasonable basis for an employer to conclude that a union has lost its majority status, for it is presumed that the new employees will support the union in the same proportion as did the old employees. See, *e.g.*, *National Labor Relations Board* v. *Little Rock Downtowner, Inc.*, 414 F. 2d 1084, 1091 (C.A. 8); *National Labor Relations Board* v. *John S. Swift Co.*, 302 F. 2d 342, 345 (C.A. 7); *National Labor Relations Board* v. *Gulfmont Hotel Co.*, 362 F. 2d 588, 592 (C.A. 5). Neither Company produced any evidence that the new employees supported the Union less avidly than the old. Indeed Company President Leatherwood admitted that he had not even given the question "a thought" (L. R. 154).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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